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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-375

SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., NEWSPAPER & PERIODICAL DRIVERS' & HELPERS' UNION LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, DOUGLAS BROWN, WALTER DE LONG, PHILLIP T. WALKER, MARVIN W. WEISSENSEE, KENNETH C. WOLLMAN, JOHN ROY CONWAY, LEROY LESTER HOLBROOK, DARRELL E. BAKER, and WILLIS P. KOLB,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INDIVIDUAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 462 F.2d 699.

STATEMENT OF THE CASE

The San Francisco Newspaper Printing Company, Inc. (hereinafter referred to as "Printing Company") is the author of the standard printed agreement entitled "Dealer Purchase and Sale Agreement" defining the relationship between itself and each newspaper dealer who sells and distributes the San Francisco Chronicle (a morning paper published by The Chronicle Publishing Company), San Francisco Examiner (an afternoon paper published by The Hearst Corporation) and San Francisco Sunday Examiner & Chronicle (a Sunday paper published jointly by The Chronicle Publishing Company and The Hearst Corporation). 462 F.2d, at 700. This agreement is very explicit about this relationship. It provides in paragraph two that:

> "Dealer is engaged in an independent business and is an independent operator, contractor, merchant and/or distributor and not an employee of Printing Company; Dealer personally hires and pays all persons assisting Dealer in the sale and distribution of the Chronicle and the Sunday Examiner & Chronicle and in the collection of money from Customers, and Dealer has sole and exclusive control over all of Dealer's agents and employees. . . ." (Pet. App. 34).

This agreement also contains a covenant against control providing "That, notwithstanding anything to the contrary in this Agreement, it [Printing Company] will not exercise any direction or control or right thereof over the manner, methods or means Dealer shall employ to perform this Agereement."

(Pet. App. 32). This agreement further provides that the Printing Company shall not be liable, and the dealer shall be solely liable for:

> "(a) Any losses or expenses incurred in Dealer's business;
>
> "(b) Any losses, damages and/or injuries to the person or property of Dealer, Dealer's agents of employees, Customers served by Dealer, and other persons, caused by or in any way connected with or attributable to any act or omission of Dealer or Dealer's agents or employees." (Pet. App. 35).

Prior to the advent of these proceedings the Printing Company scrupulously adhered to the terms and provisions of the Dealer Purchase and Sale Agreement which it prepared and utilized. By letter dated March 18, 1970, Mr. Kenneth R. Hobson, Circulation Director of the Printing Company, responded to a letter from a Chronicle subscriber as follows:

> "Mr. Weissensee, like all of our dealers, is an independent contractor and not an employee of this company so our control over his method of operation is somewhat limited.
>
> "If, at this time, you still have not received the refund mentioned in your letter, our suggestion would be for you to go to the Small Claims Court, as you have indicated." (Pet. App. 50).

By letter dated March 4, 1969, the Suburban Circulation Manager of the Printing Company, Louis F. Dubour, replied as follows to a Chronicle customer's complaint:

> "The delivery of the Chronicle in your area is handled by a contracted independent dealer, a Mr. Charles Nelson. As such, there is only a limited amount of control we can exercise over his operation . . .
>
> "Presently, Mr. Nelson is threatening Small Claims action. I cannot interfere with this threat because of our contractual relationship. I hope this action will be avoided by your payment of bill. At that time we can ask Mr. Neson to resume service, and also mail you a premium." (Pet. App. 50).

Another Chronicle customer's complaint was answered by Mr. Dubour by letter dated October 24, 1969 as follows:

> "The distribution and the collection of the San Francisco Chronicle in your area is handled by an independent dealer. Our control over a dealer is quite limited." (Pet. App. 51).

The Printing Company's adherence to the independent contractor status of its newspaper dealers was the subject of a stipulation filed on June 20, 1968 in the United States District Court for the Northern District of California in the case of *Wyman v. The Chronicle Publishing Co., et al.*, Civil No. 49256 OJC. There, a Chronicle dealer brought an action under the Sherman and Clayton antitrust acts to enjoin his termination by the Printing Company as a result of his raising the price of the Chronicle from ten cents per daily copy to fifteen cents per daily copy. (RT 2000-2001). Shortly after the filing of this action and

prior to hearing on motion for preliminary injunction the Printing Company and dealer Wyman entered into a stipulation approved by the District Court which provided that "The parties recognize that plaintiff, William F. Wyman, is free to sell the San Francisco Chronicle and San Francisco Sunday Examiner & Chronicle to his customers at whatever price he may independently decide" and that "In the interest of preserving plaintiff's present status as an independent dealer for the newspapers referred to above, defendant San Francisco Newspaper Printing Co., Inc. agrees that it will not engage in any course of conduct or action which places plaintiff at a competitive disadvantage to other indpendent dealers of said newspaper . . ." (C.P. Ex. 64, RT 2000).

Respondent Weissensee testified that on October 1, 1969 he raised the home delivery subscription prices of the San Francisco Chronicle and San Francisco Sunday Examiner & Chronicle 25 cents above the Printing Company's suggested prices without consulting any representative of the Printing Company, without consulting any other dealers and without consulting any attorney. (RT 241-242). Thereafter Printing Company Supervisor Lischeske asked him, "Why didn't you speak to me before you raised your prices?" (RT 244). Mr. Weissensee replied that the Printing Company did not consult with him when they raised the price he paid for wax bags. (RT 244-245).

The independent contractor status of the Chronicle and Examiner dealers is further indicated by the testimony of Suburban Circulation Manager Dubour on

the subject matter of Chronicle dealers distributing competing newspapers:

"A. [By Dubour] . . . and I have learned recently that our east San Jose dealer is going to put us out of business by handling the Los Angeles Times.

Q. Is that Mr. Charles Nelson?

A. Mr. Nelson, yes.

Q. And is he presently handling the Los Angeles Times and the Chronicle?

A. Yes." (RT 1172).

* * *

"Q. Did you discuss with Mr. Nelson his handling of the L.A. Times?

A. No.

Q. He went ahead without any discussion with you?

A. Yes.

Q. Do you know whether or not he had any discussion with his suburban supervisor?

A. I don't think he did. He told them he was taking on the L.A. Times." (RT 1173).

The Printing Company has no policy with respect to newspaper dealers refusing to service customers. In fact, the Printing Company cannot force its newspaper dealers to deliver newspapers to particular customers. (RT 1185).

The newspaper dealers often cancel subscriptions for nonpayment by subscriber or for improper deductions made by the customer from his bill. (RT 63, 350, 674-75). The newspaper dealers are not required to notify or consult with the Printing Company in re-

spect to the cancellation of a home delivery subscription. (RT 350, 472, 946, 1659). Newspaper dealers also refuse to service certain areas within their territory, or potential customers, because of inaccessibility for delivery of the newspaper from a motor vehicle (RT 63-64, 581, 1660) or lack of customers in a particular area. (RT 765). Newspaper dealers have also discontinued business with retail customers because their business relationship was unsatisfactory. (RT 1692-93).

A the hearing suburban circulation manager Dubour testified as follows in respect to whether or not promotion was voluntary or not:

"Q. Do you require dealers to handle some samplings during the period of time?

A. We don't require it.

Q. It's up to the dealer?

A. It is on a voluntary basis." (RT 1188-1189).

When a newspaper dealer agrees to partake in a promotion he bears the cost of delivering sample newspapers and the substantial losses that invariably result from many solicited orders turning out to be "no pays." (RT 182, 444, 526, 668-670, 810-811, 881-882).

The Printing Company has no training manuals, bulletins, instructional material or other written matter pertaining to the operation of dealerships. The Printing Company does not provide training for newspaper dealers or their helpers. (RT 38, 233-34, 282, 363, 385-87, 490, 505, 614, 626, 694, 773, 800, 961).

Suburban circulation manager Dubour testified as follows on the matter of the Printing Company's knowledge of the dealers' operation:

"Q. Now, in connection with the people employed or retained by the dealers, do you ever communicate with them?

A. No.

Q. Do you have any knowledge of who they are?

A. No.

Q. Do you or your supervisors have any list of other names or addresses or phone?

A. No.

Q. In connection with the home delivery subscribers of the newspaper dealers, do you have any list of who they are?

A. No.

Q. In connection with the retail stores, do you have any knowledge of who they are?

A. We know who they are if we go out and look at them and see where they are.

Q. Do you have any list of the names of the retail stores?

A. No.

Q. In connection with the racks of the dealers, do you have any list of where those racks are located?

A. No." (RT 1170-1171).

Supervisor Lischeske testified that in the event a dealer's route was down (i.e., one of the dealer's drivers failed to deliver his route) it would be solely up to the dealer to take care of it because "I don't know the routes" and "I don't have a list." (RT 1627-1628).

In the early part of 1968 the San Francisco Chronicle and San Francisco Examiner were not published for 53 days due to a strike by employees of the Printing Company. During this strike the Printing Company loaned money to the newspaper dealers up to a maximum of $400.00. Those dealers who borrowed money from the Printing Company were required to sign promissory notes and pay interest at the rate of six percent per annum on the unpaid balance. The Printing Company did not loan money to employees who were out on strike. (RT 397, 530, 604-05, 624, 774-5; G.C. Ex. 15(a), (b), (c); RT 994-95).

At the conclusion of the 1968 strike the Printing Company paid each of the Respondents a strike subsidy or bonus. The purpose of this subsidy or bonus was to insure the availability of Respondents as dealers when the strike was settled and to maintain paid circulation on the books of the Printing Company after the strike was settled. Respondents were informed by representatives of the Printing Company that a certain percentage of their circulations prior to the strike had been maintained after the strike in order to receive the strike subsidy or bonus. This strike subsidy or bonus was paid by means of a credit on Respondents' statements over a period of four months following the settlement of the strike. No strike subsidy or bonus was paid to Respondents during the strike. The Printing Company paid no strike subsidy or bonus to its employees. (RT 176, 271-72, 381-82, 397-98, 498, 531-32, 625, 689Q-689S, 707-08, 774, 785-86, 918, 1049).

The newspaper dealers are solely responsible for billing of customers for newspapers sold and delivered. (RT 61, 74, 347, 357). The manner and method by which the newspaper dealers bills his customers and makes his collections is determined solely by him. (RT 487). In this respect, some newspaper dealers use monthly coupon books (RT 60; G.C. Ex. 6, 7, RT 59) while others send bi-monthly bills in the form of postcards or statements of account to their customers. (RT 215). Newspaper dealers collect bills from their customers by mail, in person, by inserting the bills in the newspapers, or through a local retail business enterprise. (RT 169, 215, 470, 579, 763, 800, 944). In the event a bill is not paid the newspaper dealers may go to small claims court or turn the account over to a collection agency. The Printing Company does not participate in any manner in these proceedings. (RT 61, 348, 675-76, 1750). In the event a newspaper dealer's customer sends payment for his bill to the Printing Company rather than to the newspaper dealer, the Printing Company credits this against the newspaper dealer's monthly bill. (RT 464). The Printing Company does not give credit to newspaper dealers for lost or stolen newspapers. (RT 217, 765, 933).

The newspaper dealers own, lease or rent their own equipment. This includes delivery vehicles, vending machines, tying machines, office equipment, addressographs and record-a-phones. (TXD p. 137; RT 473, 582, 677, 766, 860). The newspaper dealers purchase this equipment from various sources, including regu-

lar business suppliers, other newspaper dealers and the Printing Company. (RT 66, 223, 352). In addition, the newspaper dealers purchase various items of supplies used in the business such as wax bags (for protecting newspapers in wet weather), rubber bands, string, forms, etc. The newspaper dealers are free to purchase these supplies from whatever source they desire and all of Respondents have purchased these items from a number of different sources based upon such factors as quality and price. (RT 108-10, 223-24, 352, 454, 475, 507-09, 599, 677-79, 689L-689N, 766-67, 784, 850, 871-73, 951, 998-99).

The process of recruitment and hiring of drivers, carriers, spotters and other persons utilized by the newspaper dealers is accomplished solely by the newspaper dealers at their expense, without the approval, knowledge or participation by the Printing Company. (RT 461-62). The newspaper dealers interview, select and hire adult drivers and helpers to assist them in the sale and delivery of newspapers. The number varies, but each dealer generally uses from four to seven persons. (RT 51, 213, 469, 577, 673, 954). The newspaper dealers determine the manner and method in which they compensate the adult drivers and helpers. The Printing Company does not participate in such matters and is not notified regarding the hiring of new employees by the newspaper dealers. (RT 53, 1748). The newspaper dealers set their own vacation schedules and employ other persons to conduct their business operations in their absence. (RT 75-76, 135, 928). Even when a newspaper dealer is

sick or injured the Printing Company refuses to render him any assistance in his business.[1]

The Printing Company maintains offices under the auspices of its Suburban Circulation Department in Corte Madera for its Marin County operations and in Mountain View for its Santa Clara County, lower peninsula and southern Alameda County operations. Carl Lischeske is the Area Supervisor in the Corte Madera office responsible for the circulation of newspapers through newspaper dealers. (RT 1607). George Theobald was the Area Supervisor in the Mountain View office responsible for the circulation of newspapers in that area through newspaper dealers. (RT 1737). Newspaper dealers in Marin County, except Weissensee, met with Lischeske once a week or less to discuss their business operations and nonbusiness matters. These meetings are scheduled at the newspaper dealer's convenience at a place selected by him. The meetings average approximately 20 to 30 minutes. About five minutes of this time is devoted to discussion regarding the sale and distribution of the Printing Company's newspapers. (RT 1636, 1695-96, 253, 485, 591, 684). At these meetings, Lischeske reviews

[1]In the fall of 1968 respondent Kolb was in an automobile accident and bedridden for approximately a month. The Printing Company's supervisor contacted Kolb and stated, "Well, I notice your wife is running [the dealership]. You are an independent contractor. You have either got to have her hire somebody or take care of it. If you have any problems, I suggest you go see one of the other dealers. If your wife has any problems, she should ask Mr. Wollman or Mr. Baker for assistance." As a result, respondent Kolb hired a man to assist his wife while he was incapacitated at a cost to him of approximately $900. (RT 477-78, 510-11, 1656-58).

"aggravated complaints" which the Printing Company received from newspaper subscribers. (RT 73). In most cases, these complaints are five to seven days old and have already been adjusted by the newspaper dealer. (RT 356, 375). In those situations in which the aggravated complaints are still pending, the newspaper dealer usually informs Lischeske of the action he is taking. Lischeske notes this in a comment on the complaint form. Sometimes Lischeske will suggest a course of action for the newspaper dealer in adjusting the complaint. (RT 1729). The newspaper dealers make their own determinations as to how the complaints will be adjusted and are not required to follow the area supervisor's suggestions. (RT 74, 175). Most complaints concern wet papers (RT 686, 1709), missing papers (RT 419), "stops" and "starts" (RT 813), and customers' complaints regarding the method and manner of the newspaper dealers' billing practices. (RT 147). At these meetings, Lischeske sometimes discusses other business matters such as newspaper promotion. In his testimony Lischeske stated that he considered the newspaper dealers to be independent businessmen and dealt with them as though they were capable of exercising their own discretion in making business decisions (RT 1646-47).

Newspaper dealers in Santa Clara County met with Suburban Supervisor Theobald on an irregular basis, sometimes only once a month. (RT 875, 956). Theobald discussed customer complaints with newspaper dealers selling and delivering to home subscribers. (RT 957, 1001).

There is nothing in the Dealer Purchase and Sale Agreement which provides that the Printing Company has an ownership or proprietary interest in the newspaper dealers' customer lists or the goodwill of his business. (Pet. App. 32-36). In addition, from September 13, 1965 to the hearing before the Trial Examiner the newspaper dealers had sole and exclusive possession and control of such lists. (RT 1381-86, 1443). New newspaper dealers normally receive their customer lists from their predecessor rather than from the Printing Company. (RT 180-81, 235-36, 369-70, 607). There is nothing in the record to support the Trial Examiner's legal conclusion that the newspaper dealers "have no ownership in the territory, goodwill or customer lists." (Pt. App. 47). The Dealer Purchase and Sale Agreement is silent on this matter and it is presently the subject of litigation in the state courts in California.

ARGUMENT

A. THERE IS NO DIRECT CONFLICT BETWEEN THE CIRCUITS

The Petitioners contend that the decision of the United States Court of Appeals for the Ninth Circuit in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *The Herald Company v. NLRB*, 444 F.2d 430 (2d Cir. 1971). A careful review of the facts in each case demonstrates that the two cases are quite dissimilar.

In the *Herald Company* case it was found that "the Company may service the customer by delivering the paper itself. It then levies a 25 cents charge on the distributor unless he can convince the Company that he should not be charged." *Id.*, at 434. The Printing Company never services the customer and when a dealer's route is down (nondelivery of a route by an employee of a dealer) it is up to the dealer to take care of it because the Printing Company doesn't know the routes and doesn't have a list of the subscribers.

In the *Herald Company* case it was found that the publisher "inundates the distributors with instruction letters, memoranda, telephone calls, and requests for office meetings." *Id.*, at 434. The record in the instant case is clear that the most frequent personal contact between the dealer and the Printing Company is five minutes once a week when dated aggravated complaints are discussed. Further, the Printing Company has no training manuals, bulletins, instructional material or other written matter pertaining to the operation of dealerships.

In the *Herald Company* case it was found that the company "requires distributors to submit to it lists containing the names and addresses of all of their customers and carrier boys." *Id.*, at 434. The instant case is 180 degrees opposed. As indicated by the testimony of the Printing Company's suburban circulation manager on page 8 of this brief the Printing Company is totally ignorant of the names, ad-

dresses and phone numbers of the dealers' employees, subscribers, retail accounts and rack locations.

In the *Herald Company* case it was found that the publisher "often gives instructions directly to carrier boys and in a few instances has instructed distributors to change or discharge them." *Id.*, at 434. This is totally foreign to the Printing Company's operation. The practice of the Printing Company is that it wants nothing to do whatsoever with the dealers' employees. It was stipulated by the parties to this proceeding that "the process of recruitment and hiring of drivers, carriers, spotters and other persons utilized by the newspaper dealers is accomplished solely by said newspaper dealers at their expense, without the approval, knowledge or participation by the Printing Company." (RT 461-62).

In the *Herald Company* case it was found that the "Herald runs numerous promotional contests in which the distributors' participation is encouraged to the point where it is *compelled.*" (Emphasis added). *Id.*, at 434. As revealed by Mr. Dubour's testimony on page 7 of this brief sampling promotion is strictly a voluntary matter. In the *Herald Company* case the "distributors are expected to provide carrier boys to assist the company's canvassers." *Id.*, at 434. No such requirement is imposed or even suggested by the Printing Company. The Chronicle dealers, with very few exceptions, all use adult car drivers to deliver the morning Chronicle to the home subscriber. These adults do this work as a part time job in addition to holding down full time jobs. They do not involve

themselves with anything but delivery. Carrier boys are a thing of the past with Chronicle dealers who handle themselves or through bookkeepers the billing and collecting from the customers and all other aspects of managing a business. The *Herald Company* case involved a distributor/carrier boy distribution system euphemistically called by publishers "The Little Merchant Plan." The instant case involves full time dealers engaged in running a business using adults. (Pet. App. 37).

The *Herald Company* case also involved extreme control by the publisher over the distributor's immediate income. *Id.*, at 434. This is due to the fact that the publisher not only sets the wholesale rate at which the Herald Company distributors purchased the paper but, in addition, since 1965 the form contract has set forth the retail rates at which the distributors sell the papers to the carriers. *Id.*, at 433. The resale prices by the carriers to the public is apparently not fixed by the contract. In the instant case there is no such control over the Chronicle and Examiner's dealers' income because there is no control over these dealers' retail prices. The parties to this proceeding stipulated that "The newspaper dealers set the retail prices that they will charge to their customers and have had the authority to do this since April 1969." (RT 458-459, 857). Accordingly, when Respondent Weissensee raised the home delivery subscription price of The San Francisco Chronicle 25 cents above the Printing Company's suggested price on October 1, 1969 the effect on his immediate in-

come was determined solely by him and not by the Printing Company. This is a far cry from the situation in the *Herald Company* case.

As correctly pointed out by the United States Court of Appeals for the Ninth Circuit in the instant case:

> "In addition, those cases which agree with the Board's finding of employee status emphasize factors absent here. The court in *Herald Co. v. NLRB*, 444 F.2d 430 (2nd Cir. 1971), noted that the record disclosed the company's substantial control over the dealer's immediate income and the ultimate value of his distributorship, plus extensive policing of delivery and compulsory participation in promotions. In *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969), the court found that the dealers could not hold outside jobs or sell competing papers. The company exercised extensive control over the manner and means of delivery, and reduced the dealer's risks of loss through subsidies, mileage refunds, price variances, and credits for returns. In both these cases, control over the details of the distributorship were clearly in the newspaper's hands." *Id.*, at 430.

From the foregoing it is clear that the instant case involves a fact situation substantially different from the case of *Herald Company v. NLRB, supra.* There is no conflict, therefore, between the Second and Ninth Circuits on the status of newspaper dealers.

B. THE NINTH CIRCUIT DID NOT EXCEED THE PROPER BOUNDS OF JUDICIAL REVIEW

Petitioners claim that "the Ninth Circuit grossly exceeded the proper limits of judicial review, as set forth by this court in *NLRB v. United Insurance Co.*, 390 U.S. 250 (1968)." (Petition, 17). According to Petitioners the instant case represents a "choice between two fairly conflicting views." (Petition, 21). This is not the case.

Section 2(3) of the National Labor Relations Act provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent contractor." This provision was part of the 1947 Taft-Hartley amendment to the National Labor Relations Act and was in response to what Congress thought was an unwarranted expansion of that definition in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) to include persons who would be considered independent contractors at common law.[2] Congress broadly viewed as "employees" persons who "work for wages or salaries under direct supervision" and as "independent contractors" persons who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but on the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profits.[3] The purpose of this

[2]H. Rept. 245 on H.R. 3020, 80th Cong., 1st sess., p. 18; and H. Conf. Rept. 510 on H.R. 3020, 80th Cong., 1st sess., pp. 32-33.

[3]H. Rept. 245, supra at fn. 2.

amendment "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Company of America, supra.*

Under agency principles, each case should be determined on its own facts. *Frito-Lay, Inc. v. NLRB,* 385 F.2d 180, 188 (7th Cir. 1967). No single factor is controlling and the totality of the circumstances must be considered. *NLRB v. A. S. Abell Co.,* 327 F.2d 1 (4th Cir. 1964). However, this is not purely a factual finding but involves the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor? *NLRB v. United Insurance Co. of America, supra* at 260. Furthermore, such a determination of pure agency law involves no special administrative expertise that a court does not possess. *Ibid.* Correct application of law is a proper subject for judicial review. *Carnation Co. v. NLRB,* 329 F.2d 1130 (9th Cir. 1970).

Restatement (Second) of Agency §220, at 485-486 (1958) states:

> "* * *
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

* * *

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

* * *

(j) whether the principal is or is not in business.

the basic manner and means as well as the result, of the deliverers' work."

In the instant case the Board failed to apply the accepted principles of the law of agency to the facts of the case. The facts are clear that the newspaper dealers are independent businessmen whose earnings are controlled by self-determined policies, personal investment, expenditure, and market conditions. The Printing Company has not, to any appreciable extent, reserved the right to control the manner and and the means by which the newspaper dealers transact their business. Rather, the control which the

Printing Company exercises over its newspaper dealers is directed towards the *result* to be accomplished. Thus, the newspaper dealers control the price they charge for papers, the number of papers they purchase from the Printing Company, the manner and means by which they collect bills from their customers, and, indeed, even the selection or rejection of the customers they serve. The newspaper dealers own their vehicles and equipment, pay their own expenses, are not carried on the payroll of the Printing Company, and select and compensate adult drivers and helpers to work for them. Neither the newspaper dealers nor their adult drivers and helpers are trained by the Printing Company. The dealers are not required to engage personally in the delivery of newspapers to customers. In the event of sickness, disability or vacation, a dealer remains responsible for the operation of his dealership and is not assisted or aided by the Printing Company in maintaining the sale and distribution of newspapers in his territory. In addition, the dealers engage in other business operations, including the sale of competing newspapers. Further, the Dealer Purchase and Sale Agreement and the record evidence demonstrate that the dealers bear the entire risk of loss of their business operations.

In concluding that the newspaper dealers are "employees," the Trial Examiner relied substantially upon the fact that the Printing Company requires its newspaper dealers to keep certain business records and to supply it with copies of messages and customer com-

plaints. These facts, however, are also common to most franchisor-franchisee relationships and are not particularly indicative of an employment status. Such control is not necessarily proof of the kind of control that is relevant to a decision whether a person is an independent contractor or an employee. *Brown v. NLRB, supra* at 703. Moreover, scrutiny of the record evidence shows that the Printing Company does not exercise control over the manner and means of the dealers' job performance through administration of customer complaints. The Printing Company's entire inquiry is directed at assuring that newspapers are delivered rather than the manner or method by which they are delivered. Thus, the record shows that dealers meet with representatives of the Printing Company only once a week at most, for approximately twenty minutes, and spend only a small percentage of this meeting time actually discussing business items. The customer complaints which are discussed at these meetings are usually one week old and almost always have already been adjusted by the dealer. Also, the dealers make their own determinations as to how they will correct or adjust particular customer complaints. While representatives of the Printing Company have, on occasion, suggested particular methods of adjusting customer complaints, the dealers are not required to follow these suggestions and have often adopted contrary approaches.

From the foregoing it is clear that the Board did not correctly apply the law of agency to the facts of this case in concluding that the individual respond-

ents were "employees." Properly applying the law of agency to the record evidence clearly establishes that the newspaper dealers are independent businessmen engaged in business for profit as "independent contractors."

CONCLUSION

The instant case is unique amongst the many newspaper dealer cases decided by the Board and the courts. This is the first case that a newspaper publisher has argued that the written contract which it prepared and utilized in the distribution of its newspapers does not mean what it says. Here, the Printing Company in essence claims that despite the independent contractor provisions of its written Dealer Purchase and Sale Agreement they are really a sham and should be disregarded. The reason for this is that the Printing Company is more concerned with maintaining its covenants with Local 921 of the Teamsters Union than its covenants with its newspaper dealers who do not have the power to call a strike and close down the Printing Company.

Furthermore, the instant case is unique in the sense that an employer and a labor organization can avoid responsibility for engaging in "hot cargo" violations of Section 8(e) of the National Labor Relations Act by merely attempting to control the victims of such violations in such a manner that they become "employees" rather than "independent contractors."

The court is respectfully requested to deny the petition for a writ of certiorari and permit the case to be decided by the National Labor Relations Board on its merits.

Dated, October 17, 1972.

Respectfully submitted,

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